Supreme Court, U.S.
FILED
OCT 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-220

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

JAMES E. SECRIST,

Petitioner,

v.

UNITED STATES SENATOR TOM HARKIN, PAM MCKINNEY, JOHN FREW, AND CITIZENS FOR HARKIN

Respondents.

REPLY BRIEF OF PETITIONER TO BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

*ALEXANDER W. WHITAKER
1815 H Street, N.W.
Suite 600
Washington, D.C. 20006-3604
(202) 785-9240

Attorney for Petitioner

*Counsel of Record

TABLE OF CONTENTS

Page

I. THE NEWS RELEASE OF CANDIDATE HARKIN, WHEN VIEWED IN ITS *ENTIRETY*, CONCLUSIVELY DEMONSTRATES THAT THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, IN AFFIRMANCE OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS, FAILED TO PERFORM A *COMPLETE DE NOVO* REVIEW OF THE *ENTIRE* RECORD BEFORE IT, AS REQUIRED BY OVER 25 YEARS OF PRECEDENT FROM THIS COURT ON THE ISSUES OR ACTUAL MALICE AND OPINION 1

CONCLUSION 3

APPENDICES

TABLE OF APPENDICES

APPENDIX A: RECORD COPY OF THE *ENTIRE* "HARKIN U.S. SENATE NEWS RELEASE OF OCTOBER 11, 1984" 1a

TABLE OF AUTHORITIES

	Page
CASES	
Easton Publishing Company v. *Alfred R. Boettger*, Supreme Court of the United States Docket No. 89-265, Order List — Certiorari — Summary Disposition (Oct. 10, 1989), ___ U.S. ___ (1989) .	4
Florida Star v. *B.J.F.*, 491 U.S. ___, 105 L. Ed.2d 443, 109 S.Ct. 2603 (1989)	4
Harte-Hanks Communications, Inc. v. *Connaughton*, 491 U.S. ___, 105 L.Ed.2d 562, 109 S.Ct. 2678 (1989)	3
Jones v. *Palmer Communications, Inc.*, ___Iowa___, 440, N.W. 2d 884 (1989)	3
New York Times, Co. v. *Sullivan*, 376 U.S. 254 (1964)	2
Ollman v. *Evans*, 242 U.S. App. D.C. 301, 750 F.2d 970 (1984), *cert. denied*, 471 U.S. 1127-30 (1985) .	3
Secrist v. *Harkin*, 874 F.2d 1244 (8th Cir. 1989) . . .	1

No. 89-220

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

JAMES E. SECRIST,

Petitioner

v.

UNITED STATES SENATOR TOM HARKIN, PAM MCKINNEY, JOHN FREW, AND CITIZENS FOR HARKIN

Respondents

Reply Brief of Petitioner to Brief for the Respondents in Opposition to

Petition for Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit

I. THE NEWS RELEASE OF CANDIDATE HARKIN, WHEN VIEWED IN ITS *ENTIRETY*, CONCLUSIVELY DEMONSTRATES THAT THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, IN AFFIRMANCE OF SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENTS, FAILED TO PERFORM A *COMPLETE DE NOVO* REVIEW OF THE *ENTIRE* RECORD BEFORE IT, AS REQUIRED BY OVER 25 YEARS OF PRECEDENT FROM THIS COURT ON THE ISSUES OR ACTUAL MALICE AND OPINION.

This reply is required for *three* principal reasons:

(1) The Eighth Circuit's opinion not only failed to exhaustively and meticulously review each and every statement of the news release complained of in the instant petition, but also failed to include the *entire* news release as published by Candidate Harkin on October 11, 1984. *Secrist*

v. Harkin, 874 F.2d 1244, 1253-54 (8th Cir. 1989); *see also* Pet. App. at 19b-21b; *compare* Reply at 1a-5a (Rec. at 28-31).

(2) The Respondents in their opposition have further attempted to undermine the significance of the *entire* news release by presenting to this Court an even more diluted version of the *entire* news release. *Brief For Respondents In Opposition* (hereinafter "Respond. Opp.") at Appendix (hereinafter "App.") 1a-1b.

(3) The Petitioner was informed by the Clerk of the United States Court of Appeals for the Eighth Circuit that Petitioner's timely request to have the record below certified and transmitted to this Court (*particularly*, Rec. at 28-31, the *entire* news release) would be held in abeyance pending a specific request by this Court.

Accordingly, peititioner submits the *entire* press release of Candidate Harkin as tendered by the respondents; and, as such, it was not thoroughly reviewed or even discussed by the Court below. (*See* Appendix to this Reply at 1a-5a). The purpose of this press release, when viewed in its entirety, was to provide supporting documentation, obviously gathered over several months preceding, to prove, from a *factual* standpoint, that the petitioner was engaged in criminal activity on behalf of the opposing candidate.

It should be noted, in reply, that respondents at page 12 of their opposition are fein to suggest to this Court that a *de novo* review of the entire record by the court of appeals below, or for that matter this Court, is merely a simple invitation by the petitioner. To the contrary, petitioner stands behind over 25 years of precedent from this Court in "public figure" cases on the issues of *actual malice* and *opinion*, from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) through *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ____, 105 L. Ed. 2d 562, 109 S.Ct. 2678 (1989).

Finally, what appears obvious to the petitioner and, hopefully, to this Court with a copy the *entire* news release of

Candidate Harkin now before it for the *first* time, neither did the court of appeals nor the district court below, in their collective findings that a *part* of the *entire* news release was protected opinion, conduct a meticulous, exhaustive analysis of this *publication* as would be indicated by the 25-year precedent from this Court. *Ollman v. Evans*, 242 U.S. App. D.C.-301, 750 F.2d 970 (1984), *cert. denied*, 471 U.S. 1127-30 (1985); *see also, Jones v. Palmer Communications, Inc.*, ____Iowa____, 440 N.W. 2d 884 (1989).

CONCLUSION

It is submitted that the brief in opposition to this petition is unresponsive to the issues presented and, further, that the decision of the court of appeals below has, under the precedent from this Court, failed in its fundamental duty to examine the publication, Candidate Harkin's news release, as a whole before affirming a summary judgment in favor of the respondents or declaring the *entire* news release to be opinion.

Procedurally, *ceteris paribus*, the posture of this case for decision under this Court's recent decision in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. ____, 105 L.Ed. 2d 562, 109 S.Ct. 2678 (1989) bears a striking resemblance to this Court's recent summary disposition of a petition for certiorari to the Supreme Court of Pennsylvania on October 10, 1989, in *Easton Publishing Company* v. *Alfred R. Boettger*, Supreme Court of the United States Docket No. 89-265, wherein this Court granted the petition for certiorari, vacated the judgment and remanded the case to the Supreme Court of Pennsylvania, Eastern District for further consideration under *Florida Star* v. *B.J.F.*, 491 U.S. ____, 105 L. Ed. 2d 443, 109 S.Ct. 2603 (1989).

Although counsel of record herein did request that the Clerk of the United States Court of Appeals for the Eighth Circuit certify and transmit the record in this case to this

Court, he was informed by said clerk that this would not be done unless this Court so requested. In any event, unless the record, albeit referenced by the petition, presents issues left unresolved by this Court in *Connaughton*, the relief afforded *Easton Publishing Company, supra*, may well fit the circumstances of this case.

Accordingly, it is respectfully requested that this Court grant instant petition for a writ of certiorari, vacate the judgment of the United States Court of Appeals for the Eighth Circuit and remand it to that court for further consideration in light of *Connaughton*.

Respectfully submitted,

*ALEXANDER W. WHITAKER
1815 H Street, N.W.
Suite 600
Washington, D.C. 20006-3604
(202) 785-9240

Attorney for Petitioner

---

*Counsel of Record

APPENDIX A

HARKIN
U.S. SENATE
NEWS

3213 S.W. 9th Street Des Moines, Iowa 50315
(515) 282-5050

FOR IMMEDIATE RELEASE
Oct. 11, 1984

For more information call:
Pam McKinney 515/282-5050

THE JEPSEN COLONEL CAPER

DES MOINES—A pentagon Marine Colonel assigned to drum up defense contracts for Iowa has been more successful at raising money for Sen. Roger Jepsen's reelection bid, according to U.S. Rep. Tom Harkin, a candidate for the U.S. Senate.

Lt. Col. James E. Secrist was the subject of controversy last year when the Pentagon paid his $45,000 annual salary while assigning him to work as a member of Sen. Jepsen's personal Washington staff.

According to the Navy and Sen. Jepsen's office, Secrist was assigned to Jepsen to assist businesses in Iowa with the Pentagon's procurement process and obtain more defense contracts for the state.

During the time Secrist has been on the Jepsen staff, however, the percentage of national defense contract dollars awarded to Iowa businesses has not increased.

In the first half of FY 1984, Iowa has only received $132 million from defense contracts, approximately one-third of the total received in 1983. (Source: Department of Defense Office of Information).

Since its formation, the Jepsen '84 Committee has received more than $88,000 from defense contractors' contributions, including Lockheed, Boeing TRW and LTV; about 60 percent of that amount was received after Secrist joined the Jepsen staff.

Secrist's assignment to the Jepsen office staff was approved in May of 1983 after the Senator personally sought and received permission from the Secretary of the Navy.

As chairman of the Armed Services Subcommittee on Manpower and Personnel, Jepsen oversees the process which sets employee ceilings for each military branch and has jurisdiction over military pay and benefits.

— MORE —

* A continuation of the first page of the entire news release (Rec. at 28).

DEFENSE CONTRACT CONTRIBUTIONS TO THE JEPSEN '84 COMMITTEE

Bendix PAC	$ 250
Eaton Public Policy	$ 3,000
Fairchild Industries	$ 1,750
General Dynamics	$ 6,950
Grumman Corp.	$ 3,000
Harris Corp.	$ 4,750
Hughes Aircraft	$ 3,900
Hughes Helicopter	$ 750
Litton Industries	$ 7,900
Lockheed	$ 4,283
LTV Corp.	$ 2,650
MartinMarietta Corp.	$ 2,500
McDonnell Douglas Corp.	$ 2,500
Boeing	$ 3,500
Northrup Employees	$ 3,366
Raytheon Co.	$ 5,450
Rockwell Int.	$10,625
Signal	$ 1,000
Texton	$ 2,000
TRW	$ 2,250
United Telecommunications	$ 1,100
United Technologies	$ 1,500
Vaught Co. Active Citizenship	$ 2,000
Planning Research	$ 2,000
Beech Aircraft	$ 1,000
Colt	$ 500
Donaldson	$ 100
FMC	$ 4,950
Gould	$ 1,750
Motorola	$ 1,100
Westgear	$ 500
	$88,874

* The second page of the entire news release (Rec. at 29).

SCHEDULE B ITEMIZED DISBURSEMENTS

Use separate schedule(s) for each category of the Detailed Summary Page

PAGE 13 OF 26

FOR LINE NUMBER 17

Any information copied from such Reports and Statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee.

NAME OF COMMITTEE (in Full)

Jepsen '84 Committee

	A. Full Name, Mailing Address and ZIP Code	Purpose of Disbursement / Disbursement for	Date (month, day, year)	Amount of Each Disbursement This Period
	Iowa Power and Light Co. P.O. Box 657 Des Moines, Iowa 50303	Utilities Disbursement for: ☒ Primary ☐ General ☐ Other (specify):	05-04-84	$376.50
	B. Full Name, Mailing Address and ZIP Code Dee Jepsen 301 North Beauregard Street, #815 Alexandria, Virginia 22312	**Purpose of Disbursement** Dinner Expenses Travel Expense Reimb. **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 45.20 777.00
**	**C. Full Name, Mailing Address and ZIP Code** Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Reimbursement of Travel Expenses - Jim Secrist **Disbursement for:** ☒ Primary ☐ General ☐ Other (specify):	**Date (month, day, year)** 05-30-84	**Amount of Each Disbursement This Period** 569.51
	D. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Campaign Lodging Reimb. Roger W. Jepsen **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 144.54
**	**E. Full Name, Mailing Address and ZIP Code** Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Reimbursement of Travel Expenses - Jim Secrist **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 471.77
	F. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** U.S. Senate Post Office Postage Expense **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 368.97
	G. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Reimbursement of Travel Expenses - Senator Jepsen **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 77.00
	H. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Taping Dubbing expenses KCAU **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 25.00
	I. Full Name, Mailing Address and ZIP Code Roger W. Jepsen, Office Account Rm 120, Russell Senate Office Bldg. Washington, D.C. 20510	**Purpose of Disbursement** Tape Expense from Iowa Public Brd. Network **Disbursement for:** ☐ Primary ☒ General ☐ Other (specify):	**Date (month, day, year)** 06-12-84	**Amount of Each Disbursement This Period** 16.13

SUBTOTAL of Disbursements This Page (optional)	2,871.62
TOTAL This period (last page this line number only)	

*The third page of the entire news release (Rec. at 30); this page is a true copy of the public record on file with the Federal Election Commission.

**The entries were circled in pen on this page of the entire news release.

4a*

[Illegible] . . . approved Secrist's assignment to Jepsen's office in response to a May 24, 1983 letter from Jepsen to Navy Secretary John F. Lehman Jr. In the letter, Jepsen asked Lehman to "take action to assign Lieutenant Colonel Secrist to my personal staff through the remainder of the 98th Congress." Secrist became a member of the Jepsen Staff on July 1, 1983.

Congressional Quarterly also reported, "Defense Department rules (Directive 1000.17) governing the assignment of employees to non-department offices point out that such assignments are 'generally not favored and shall be rigorously controlled' and will be made 'only in furtherance of specifically identifiable interests of the Defense Department.' Neither Defense Department nor Navy spokesmen could name the 'specifically identifiable interests' furthered by Secrist's assignment." (CQ page 1660 Aug. 13, 1983).

In an August 20, 1983 letter to the Des Moines Register, Jepsen wrote, "Also, you will look in vain for Lt. Col. Secrist at any election-year hearings or public event in Iowa next year. His responsibilities lie in service to Iowa not in 'opening my car door.'"

According to Harkin, Lt. Col. Secrist's involvement is clear. In the May 17-June 30, 1984 Federal Election Commission Report, Secrist's name appeared twice for reimbursement of more than $1,000 for travel expenses during that period. The reimbursements were made from Jepsen's office account. That office account has also come under fire this year for failure to report funds to the Federal Election Commission and the Internal Revenue Service.

"While the Lt. Col. may not be opening the Senator's car doors," Harkin said. "It appears that he is successful at opening doors to defense campaign money coffers on behalf of the Senator."

— END —

---

* The fourth and last page of the entire news release (Rec. at 31).